STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Murphy, P.J., and Sawyer and Bandstra, JJ.

People of the State of Michigan,
Plaintiff-Appellee,

v

Docket No. 123491

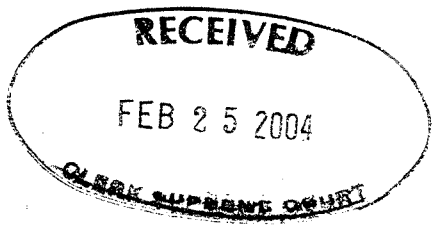
Edmund McGeHee Barbee,

Defendant-Appellant.

_____/

BRIEF ON APPEAL—APPELLEE

ORAL ARGUMENT REQUESTED



DENNIS LABELLE
GRAND TRAVERSE COUNTY
PROSECUTING ATTORNEY
By: Robert A. Cooney (P47454)
Assistant Prosecuting Attorney
Attorney for Plaintiff-Appellee
324 Court Street
Traverse City, Michigan 49684
Telephone: (231) 922-4600

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Unpublished Cases:

Constitutions, Statutes, Public Acts & Court Rules:

Miscellaneous:

STATEMENT OF BASIS OF JURISDICTION

Plaintiff accepts defendant's statement of the basis of jurisdiction of the Supreme Court.

STATEMENT OF QUESTION PRESENTED

Was OV-19 properly scored 10 points where defendant gave a false name to law enforcement officers prior to his arrest?

Trial Court answers: "Yes."

Defendant-Appellant answers: "No."

Plaintiff-Appellee answers: "Yes."

STATEMENT OF FACTS

Plaintiff accepts defendant's statement of facts as accurate and complete for purposes of this appeal.

ARGUMENT

POINTS MAY BE ASSESSED UNDER OV 19 FOR CRIME SCENE BEHAVIOR, INCLUDING PROVIDING FALSE INFORMATION OF IDENTITY TO A LAW ENFORCEMENT OFFICER.

Defendant is not entitled to resentencing where he "otherwise interfered with or attempted to interfere with the administration of justice," MCL 777.49(c), by providing false information of identity to the arresting officer. The Sentencing Guidelines do not limit application of OV 19 to actions of a defendant which directly undermine or prohibit the judicial process. Therefore, this Court should find that the trial court did not err in assessing 10 points for OV 19, and affirm defendant's sentence.

Standard of Review: Application of the statutory sentencing guidelines presents a question of law this Court reviews de novo. *People v Libbett*, 251 Mich App 353, 365 (2002). Scoring decisions for which there is any supporting evidence will be upheld. *People v Hornsby*, 251 Mich App 462, 468 (2002).

Preservation of the Issue: Defendant objected at sentencing to the scoring of OV 19, but on different grounds than those which are raised in his brief on appeal, and, therefore, the issue was not properly preserved for appeal at sentencing. *People v McGuffey*, 251 Mich App 155 (2002), lv den 468 Mich 859 (2003). The issue was first raised by defendant in his motion for resentencing. MCL 769.34(10) permits objection to guideline scoring issues to be raised by way of post-conviction motion.

Analysis: Scoring of OV 19 is not limited to actions of a defendant that directly undermine or prohibit the judicial process by which a criminal charge is processed, as defendant advocates. In *People v Deline*, 254 Mich App 595 (2003), the Court of Appeals erred in finding that the language used in OV 19, "otherwise interfered with or attempted to interfere with the administration of justice," is equivalent to the phrase "obstruction of justice." *Id.* at 597. The Court compounded this error by then determining that "obstruction of justice," and therefore application of OV 19, is limited to actions which involve an effort to undermine or prohibit the judicial process. This Court should find that the phrase "interfere with or attempt to interfere with the administration of justice" as used in OV 19 is a broad phrase which includes crime scene behavior and that the trial court properly scored 10 points for OV 19.

(1) The phrase "interfered with or attempted to interfere with the administration of justice" is not equivalent to the phrase "obstruction of justice."

Defendant contends that the phrase "interfered with or attempted to interfere with the administration of justice" is equivalent to "obstruction of justice." In support of this argument, defendant cites the Court of Appeals holding in *Deline*, *supra*. In that case the Court held that: "Interference with the administration of justice . . . involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is resolved." *Id.* at 597. Hence, the Court concluded, scoring OV 19 was inappropriate where defendant's refusal to take a blood-alcohol content test and switching seats with his passenger was not "aimed at undermining the judicial process by which charges against him would be determined." *Id.* Plaintiff contends that the *Deline* Court gave too

narrow an interpretation to the phrase "interfere with the administration of justice," which is a broad phrase that includes a variety of acts, including those which fall within the category "obstruction of justice."

Offense variable 19 is set forth in MCL 777.49 which, at the time of commission of the instant offense, provided in its entirety as follows:

> Sec. 49. Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender by his or her conduct threatened the security of a penal institution or court.....25 points
>
> (b) The offender used force or the threat of force against another person or the property of another person to interfere with, or attempt to interfere with the administration of justice.....15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice.....10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice.....0 points[1]

The *Deline* Court begins its analysis of the statute by finding that the phrase "'interference with' justice[2] is equivalent in meaning to 'obstruction of' justice." *Deline*,

---

[1] MCL 777.49 has been amended twice since the date of Mr. Barbee's offense on September 30, 2001. PA 2001, No 136, in subdivision (b), substituted "attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services" for "or attempt to interfere with the administration of justice". PA 2002, No 137, in the first sentence of the introductory paragraph, inserted "or the rendering of emergency services"; and, in paragraph (d), added "or the rendering of emergency services by force or threat of force".

[2] The complete phrase used in the statute is "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). It is unclear whether the *Deline* Court gave any importance to the term "administration" when it referred to the language of the statute as "interference with justice." *Id.* at 597.

supra at 597 (citing Garner, *A Dictionary of Modern Legal Usage* (2d ed), p 611).[3] For several reasons, the Court's reasoning is flawed. First, rather than attempt to ascertain the meaning of the language used in the statute, "interfere with the administration of justice," the Court, without explanation, assumes that the phrase is equivalent to "obstruction of justice." Hence, the Court gives meaning to the language of the statute by referring to the definition of "obstruction of justice." The Court does not explain this missing step, and one wonders why the Court chose to look to Garner's definition of "obstruction of justice" when the phrase "administration of justice," is defined elsewhere. This is particularly true when Garner's more frequently cited work of legal lexicography, *Black's Law Dictionary*, defines both phrases, "administration of justice," and "obstruction of justice." Moreover, the word "administration" does not appear anywhere in the definition of "obstruction of justice" given in Garner's lesser known work.

Likewise, defendant takes a beguilingly circuitous route in attempting to ascertain the meaning of these two phrases by consulting a non-legal dictionary (*Random House Unabridged Dictionary of the English Language* (1971 ed)) for the meaning of the words "administration"[4] and "justice," arriving at a definition of "administration of justice" that somehow combines the two definitions. All this trouble when the phrase "administration of justice" is already defined by the seminal authority on legal terminology, *Black's Law Dictionary*, which states as follows:

---

[3] It is unclear from the Court's opinion to what definition of word or phrase the Court is referring. A review of Garner's reveals the following at page 611: "[O]bstruction of justice" is defined as follows: "*obstruction of justice* (= interference with orderly administration of law) is a broad phrase that captures every willful act of corruption, intimidation, or force that tends somehow to impair the machinery of the civil or criminal law."

[4] Defendant cites *Black's Law Dictionary* for the definition of the term "justice" but does not bother to cite Black's definition of "administration" which begins as follows: "1.The management or performance of the *executive duties* of a government, institution or business. . . ." [Emphasis added].

> Administration of justice. The maintenance of right within a political community by means of the physical force of the *state*; the *state's* application of the sanction of force to the rule of right (emphasis added). Garner, *Black's Law Dictionary* (7th ed 1999), p 45.

The above definition clearly places the administration of justice with the "state," which would normally include police and prosecutors, rather than limiting its application to courts.

Nor is the definition of "obstruction" supportive of defendant's argument. The *complete* definition of "obstruction of justice" [5] given in *Black's* is as follows:

> Interference with the orderly administration of law and justice, *as by giving false information to or withholding evidence from a police officer or prosecutor* [emphasis added], or by harming or intimidating a witness or juror. Obstruction of justice is a crime in most jurisdictions. – also termed *obstructing justice*; *obstructing public justice*. *Black's, supra* at 1105.

Obviously, the first example of "obstruction of justice" cited by *Black's* – "as by giving false information to or withholding evidence from a police officer or prosecutor" – flies in the face of both the *Deline* Court's interpretation of the phrase, as well as defendant's argument that "obstruction of justice" is limited to acts directly interfering with the judicial branch of government. Finally, in *Merriam-Webster's Dictionary of Law* (8th ed 1996) "obstruction of justice" is defined as follows:

> Obstruction of justice – the crime or act of willfully interfering with the process of justice and law esp. by influencing, threatening, harming, or impeding a witness, potential witness, juror, or judicial or legal officer or by furnishing false information in or otherwise

---

[5] Defendant refers to *Black's* definition of "obstruction of justice" in a footnote to his discussion of the *Random House Unabridged Dictionary of the English Language* definition of the words "administration" and "justice." Ignoring, once again, that this is not the phrase used in MCL 777.49, defendant finds himself on the defensive in attempting to explain *Black's* definition of "obstruction of justice" which simply defines the phrase as the "fair and proper administration of laws." Defendant also fails to acknowledge that *Black's* cites as one of two examples of obstruction of justice: "giving false information to or withholding evidence from a police officer or prosecutor."

> impeding an investigation or legal process. Example: the defendant's *obstruction of justice* led to a more severe sentence.

Turning from dictionary definitions to case law, a careful review of the cases cited by defendant in support of his argument that OV 19 is limited to actions of a defendant which directly affect the judicial process actually leads one to the opposite conclusion, that is, that the phrase "interfered with or attempted to interfere with the administration of justice" is not equivalent in meaning to the phrase "obstruction of justice." Despite defendant's assertions to the contrary, this Court's decision in *People v Thomas*, 438 Mich 448 (1991), does not support the proposition that the phrase "interfered with or attempted to interfere with the administration of justice," is equivalent in meaning to the phrase "obstruction of justice." Defendant, in support of the reasoning in *Deline*, points out that in *Thomas, supra,* this Court states that: "Obstruction of justice is generally understood as an interference with the orderly administration of justice." *Thomas*, *supra* at 455. However, defendant fails to recognize that in *Thomas* this Court went on to draw a clear distinction between acts which constitute an "obstruction of justice" and those which "interfere with the administration of justice:"

> Like breach of the peace, at common law obstruction of justice was not a single offense but a category of offenses that interfered with public justice. *If we now simply define obstruction of justice as an interference with the orderly administration of justice, we would fail to recognize or distinguish it as a category of separate offenses.* We find no basis for this at common law.
>
> To warrant the charge of common-law obstruction of justice, defendant's conduct must have been recognized as one of the offenses falling within the category "obstruction of justice." *Id.* at 457 (emphasis added; footnote omitted).

The Court goes on to analyze the facts of that case to determine whether the defendant's actions fall into one of the twenty-two offenses recognized at common law as constituting

the crime of obstruction of justice.[6] Rather than equate the two phrases, the *Thomas* Court distinguishes the phrase "obstruction of justice," from the phrase "interference with the administration of justice." In fact, the Court concludes that while defendant's act of failing to uphold the law by falsifying a police report interfered with the administration of justice, it did not constitute an "obstruction of justice." The Court states:

> This Court recognizes defendant's conduct as a substantial impediment to the administration of justice. On these facts, however, we find no basis in the common law for a charge of "obstruction of justice. *Id.* at 458.

Although in *Thomas* this Court held that making a false statement in a police report in support of an arrest warrant did not constitute the crime of obstruction of justice, its holding was based solely upon the fact that defendant's actions were not recognized as an indictable offense at common law. *Id.* Defendant's assertion that *Thomas* stands for the proposition that a defendant's actions must somehow be aimed at interfering with or precluding the judicial process is mistaken.

Defendant cites the decision in *People v Vallance*, 216 Mich App 415 (1996), for the same proposition. However, the Court in that case did not equate "interference with

---

[6] The twenty-two offenses are: Imbezzling or vacating records, or falsifying certain other proceedings in a court of judicature.... 2. [induce a prisoner] to accuse and turn evidence against [another].... 3. ... obstructing the execution of lawful process.... 4. An escape of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold.... 5. Breach of prison by the offender himself, when committed for any cause.... 6. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment.... 7. ... returning from transportation ... before the expiration of the term for which the offender was ordered to be transported.... 8. ... taking a reward, under pretence of helping the owner to his stolen goods.... 9. Receiving of stolen goods, knowing them to be stolen.... 10. ... the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute.... 11. Common barretry is the offence of frequently exciting and stirring up suits and quarrels.... 12. ... officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise.... 13. Champerty ... being a bargain with a plaintiff or defendant ... to divide the land or other matter sued for between them.... 14. ... compounding of informations upon penal statutes.... 15. ... conspiracy ... to indict an innocent man.... 16. ... perjury.... 17. Bribery.... 18. Embracery is an attempt to influence a jury corruptly to one side.... 19. The false verdict of jurors, whether occasioned by embracery or not.... 20. ... negligence of public officers.... 21. ... oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office.... 22. ... extortion.... *Thomas*, *supra* at 455-458, note 5 (citing 4 Blackstone, Commentaries (1890), pp. 161-177).

the administration of justice" with "obstruction of justice," but, following this Court's reasoning in *Thomas*, found that "obstruction of justice" is really a subset of the broader phrase "interfere with public justice." *Id.* at 419. The *Vallance* Court states as follows:

> . . . [W]e conclude that the Supreme Court's reference in *Thomas* to Blackstone was merely to illustrate the point that at common law, "obstruction of justice" is not a single offense, but *a category of offenses that interfere with public justice*. *Id.* at 419 (emphasis added).

This conclusion is further supported by the decision in *People v Jenkins*, 244 Mich App 1, 15 (2000), holding that: "Obstruction of justice, however, is not a single offense, but a category of crimes that interfere with the public administration of justice."

Defendant cites this Court's decision in *People v. Ormsby*, 310 Mich 291, 300 (1945), again to advance his argument that "interference with the administration of justice" necessarily requires an act aimed at the "judicial process." Defendant points to this Court's statement that the phrase "obstruction of justice" means "'impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice therein.'" There is little to be gained by parsing the language in *Ormsby* where the issue in that case was quite different than the issue raised in this case. The *Ormsby* case did not even consider the meaning of the phrase at issue in the instant case, "interfere with the administration of justice." In addition, defendant avoids addressing the obvious fact that police officers are persons having "duties or powers of administering justice." And the use of the disjunctive, "or," in separating the phrase "those who seek justice in a court" from the phrase "those who have duties or powers of administering justice" is also contrary to defendant's argument. By employing the disjunctive, the Court appears to have recognized that obstruction of justice includes acts

which impede or obstruct "those who seek justice in court," as well as acts which impede or obstruct "those who have duties or powers of administering justice therein [in court]."

Finally, defendant's contention that the phrase "interfere with or attempt to interfere with the administration of justice" is equivalent to the phrase "obstruction of justice" is contrary to well established rules of statutory construction. All words and phrases used in a statute shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning. MCL 8.3a. The Legislature is presumed to be aware of the consequences of the use or omission of language when it enacts law. *People v Spanke,* 254 Mich App 642 (2003). The phrase "obstruction of justice" is a term of art (see, e.g., *People v Davis*, 408 Mich 255 (1980) (Levin, J., dissenting) (discussing the history of the phrase "obstruction of justice")), which the Legislature should be presumed to be aware of. If the Legislature had intended to limit scoring of OV 19 only to acts which constitute the crime of "obstruction of justice," it would have used that phrase in the statute – it chose not to do so.

(2) The phrase "interfered with or attempted to interfere with the administration of justice" includes acts which occur prior to arrest which have the potential to interfere with the administration of justice.

Given the above discussion, plaintiff contends that it is clear that the phrase "interfere with the administration of justice" is not equivalent to the phrase "obstruction of justice." However, even if defendant were correct, that is, that OV 19 applies only to acts which constitute "obstruction of justice," that finding would not necessitate the

limitation suggested by defendant. Obstruction of justice is not limited to acts which occur prior to the initiation of judicial proceedings. Further, plaintiff contends that the phrase "interfered with or attempted to interfere with the administration of justice" is a broad concept that includes not only those offenses which fall within the rubric obstruction of justice (those offenses indictable at common including the twenty-two offenses listed by Blackstone (see footnote 6, supra), *Thomas, supra* at 597, as well as those offenses indictable at common law, *Vallance, supra* at 419), but also acts which interfere with police investigations.

The Court of Appeals in *Deline*, *supra*, held that "interference with the administration of justice thus involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is resolved."[7] Even if one were to wrongly accept the *Deline* Court's proposition that "obstruction of justice" equals "interference with the administration of justice," the Court in *Deline* compounds its error by holding that "obstruction of justice" is limited to efforts to undermine or prohibit the *judicial process*. Defendant, in support of this proposition, cites a number of cases which have held obstruction of justice to be found where the obstruction involves a court or grand jury proceeding. Plaintiff concedes that most offenses constituting the crime of obstruction of justice relate to an interference with judicial proceedings. However, none of these cases stands for the proposition advanced by defendant, nor do they answer the question whether acts that are unrelated to court proceedings may constitute obstruction of justice.

---

[7] The *Deline* Court cites no authority for this proposition, but makes reference to this Court's decision in *People v Coleman*, 350 Mich 268 (1957). Nowhere does the decision in Coleman make reference to the "judicial process." What the Court in *Coleman* states is that: "The crime [obstruction of justice] is committed when the effort is made to thwart or impede the administration of justice." *Id.* at 274.

A review of the 22 offenses listed by Blackstone as constituting a non-exclusive list of those offenses indictable as obstruction of justice at common law reveals a number of offenses that do not require as an element of the charged offense a pending court proceeding. Among others, Blackstone lists the following: resisting an officer; taking a reward, under pretence of helping the owner to his stolen goods; receiving of stolen goods, knowing them to be stolen; the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute; common barretry is the offence of frequently exciting and stirring up suits and quarrels; conspiracy to indict an innocent man; and negligence of public officers. *Blackstone, supra.*

Similarly, this Court has found obstruction of justice where no direct relationship exists between the defendant's actions and the judicial process. In *People v Tenerowicz*, 266 Mich 276, 282 (1934), this Court held that a conspiracy with or among public officials not to perform their official duty relative to enforcing criminal laws or certain criminal laws is an obstruction of justice (citing *People v. MacPhee*, 26 Cal. App. 218, 146 P. 522). And in *People v Davis*, 408 Mich 255 (1980), the defendant was charged with conspiracy to obstruct justice and with omitting his duty for a reward in failing to arrest a narcotics dealer found in possession of narcotics. The Court reversed defendant's conviction, not because it concluded that the substantive offense did not constitute obstruction of justice, but because Wharton's rule prohibited the use of a conviction of conspiracy to obstruct justice as a method of circumventing the punishment specifically provided by the Legislature for the activity of the defendant. *Id.* at 274-275. In separate opinions, Justices Levin and Moody specifically found that defendant's actions did

constitute the common law offense of obstruction of justice. *Id.* at 310 (Levin, J., affirming); *Id.* at 324 (Moody, J., dissenting).

This Court has acknowledged that acts of obstruction of justice or interference with the administration of justice can occur before the initiation of judicial proceedings. In *People v Philabaun*, 461 Mich 255 (1999), the Court held: "[D]efendant's conduct, although indisputably passive in nature, was nevertheless sufficient to constitute obstruction, resistance, or opposition to the deputy's execution of the search warrant for blood." *Id.* at 264. In *People v Perry*, 460 Mich 55, 61 (1999), the Court held that "[A]n accessory after the fact is 'one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder this detection, arrest, trial or punishment.' The crime of accessory after the fact is akin to obstruction of justice." *Id.* at 61. In *People v Ormsby*, 310 Mich 291 (1945), the Court states: "[C]ommon examples of obstruction of justice are the bribery and influencing of officials and officers intrusted (sic) with the enforcement of law, coercion of witnesses, interference with the obtaining of testimony, resisting an officer, and other acts generally calculated to interfere with the orderly process of the administration of law." *Id.* at 300. And in *People v Somma*, 123 Mich App 658 (1983), the Court held that: "It was an offense at common law to willfully and corruptly hamper, obstruct, and interfere with a proper and legitimate criminal investigation." *Id.* at 662 (citing 67 CJS, *Obstructing Justice or Governmental Administration*, section 9, p 134)).

In addition, the Legislature recently clarified existing crimes, created new crimes and enhanced penalties relating to obstruction of justice.[8] Vol. 3B, Gillespie, *Michigan*

[8] See PA 2000, No 451, that being MCL 750.483a, effective March 28, 2001.

Criminal Law and Procedure (2nd Ed) § 114:1, Cumulative Supplement, pp 23-24 (*citing* MCL 750.483a). These crimes include the following:

> (1) A person shall not . . . . (b) Prevent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person; . . . . (2) Retaliate or attempt to retaliate against another person for having reported or attempted to report a crime committed or attempted by another person. MCL 750.483a.

The proper test of whether an act constitutes an obstruction of justice is not whether formal judicial proceedings have been instituted, but, rather, whether the offense is one which was indictable at common law and not otherwise defined by statute. MCL 750.505; *Davis, supra.*

(3) **Analogous federal sentencing guidelines lend support to plaintiff's argument that OV 19 is not limited to acts of a defendant aimed at interfering with the judicial process, and includes crime scene behavior.**

Defendant argues that the federal sentencing guidelines lend support to defendant's contention that the phrase "interfered with or attempted to interfere with the administration of justice" is limited to those acts which directly interfere with the judicial process. Plaintiff contends that the federal guidelines, which use the phrase "interfere with the administration of justice," and allow for the scoring of acts which interfere with police investigations, more clearly support plaintiff's argument.

Analogous federal sentencing guidelines penalize "Obstructing or Impeding the Administration of Justice." 18 USCS App 3C1.1. That statute provides as follows:

> § 3C1.1 Obstructing or Impeding the Administration of Justice
>
> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the

> course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels. 18 USCS Appx § 3C1.1 (2003).[9]

The commentary[10] to § 3C1.1 sets forth a number of examples of obstruction of justice related to a defendant's behavior before the initiation of judicial proceedings. These examples include the destruction or concealment of evidence material to an official investigation, and providing a false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense. USSG § 3C1.1 notes 4(d) & (g). Federal cases have upheld such scoring of §3C1.1 for conduct occurring before the initiation of judicial proceedings (see, e.g. *United States v Waldon*, 206 F3d 597 (6th Cir 2000) (§ 3C1.1 properly scored where the defendant attempted to persuade a friend to report a car stolen just after the defendant was arrested in order to hinder the police investigation); *United States v Boyd*, 312 F3d 213 (6th Cir 2002) (§ 3C1.1 properly scored where the defendant destroyed computer files containing child pornography during the course of an investigation); *United States v Baker*, 907 F2d 53 (8th Cir 1990) (§ 3C1.1 properly scored where the defendant attempted to destroy drugs at a traffic stop)).

Defendant reasons that because the federal guidelines require that the false statement "significantly obstructed" the investigation, this limitation should therefore be read into the Michigan Sentencing Guidelines. This interpretation is contrary to the rules

---

[9] In 1990, this section was amended to change the title from "Willfully Obstructing or Impeding Proceedings" to "Obstructing or Impeding the Administration of Justice." 18 USCS App 3C1.1, historical notes.

[10] Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline. *Stinson v United States*, 508 US 36, 38 (1993).

of statutory construction which clearly dictate the opposite result. The Court may not read into a law a requirement that the law making body has seen fit to omit. *In re Hurd-Marvin Drain*, 331 Mich 504 (1952). It is well accepted that where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is inference that all omissions should be understood as exclusions. *Chesapeake & O Ry Co v Michigan Public Service Commission*, 59 Mich App 88 (1975). Furthermore, in *People v Cook*, 254 Mich App 635, 641 (2003), the Court of Appeals concludes: "[t]he limitation suggested by defendant is not found in the plain language of the statute. Nothing may be read into [a] statute that is not within the manifest intent of the Legislature as gathered from the act itself." *Id.* 641 (citing *In re Juvenile Commitment Costs*, 240 Mich App 420 (2000)).

The clear inference to be drawn from the federal sentencing guidelines and cases interpreting those guidelines is that the United States Congress considers "Obstructing or Impeding the Administration of Justice" to include acts which are not aimed solely at the judicial process. Certainly the Michigan Sentencing Guidelines Commission did not invent the guidelines out of whole cloth. It is difficult to conceive that the Commission acted without any reference to the federal guidelines. The fact that the Legislature decided not to qualify the phrase "interfere with the administration of justice" by specifically excluding acts that do not substantially interfere with a police investigation, as did the federal guidelines commission, does not in any way change the interpretation to be given OV 19. If the Michigan Legislature did, in fact, refer to the federal guidelines for assistance in developing its own sentencing guidelines, this argument could only lend support to plaintiff's argument that "interference with or attempted interference with the

administration of justice" includes acts which occur prior to the initiation of formal judicial proceedings.

(4) In attempting to find the Legislature's intent in enacting OV 19, the *Deline* Court improperly engaged in statutory construction where the language of MCL 777.49 is plain and unambiguous. Even if judicial construction of the statute were appropriate, the Court ignores the rules of statutory construction in reaching its decision.

Even if this Court were to find that the language of the statute is ambiguous, the interpretation suggested by defendant is not consistent with rules of statutory construction and would render some of the language of the statute unnecessary or illogical. The *Deline* Court based its decision in part upon its view that:

> If we were to conclude that this evasive and noncooperative behavior justified the imposition of points under OV 19, that variable would apply in almost every criminal case. Defendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt. *Deline, supra* at 597-598.

If statutory language is clear, judicial construction is normally neither necessary nor permitted, and the statute must be enforced as it is written, *Storey v Meijer, Inc*, 431 Mich 368, 376 (1988); *Michigan Mun Liability and Property Pool v. Muskegon County Bd of County Road Com'rs*, 235 Mich App 183 (1999), and judicial construction beyond those terms is precluded. *Lorencz v Ford Motor Co*, 439 Mich 370, 376 (1992). The Court in *Deline* did not engage in statutory construction where it found the meaning of the phrase "interfere with the administration of justice," to be clear and unambiguous. Therefore, it is curious that the Court then engages in judicial construction by attempting to ascertain the Legislative intent of the statute to justify its holding.

Nevertheless, even if one were to judicially construe MCL 777.49, the Court's reasoning in this regard is flawed in that it fails to recognize that there are other offense variables that are scored far more frequently than not. OV 18, Operator Ability Affected by Alcohol of Drugs,[11] is scored at least 10 points in nearly every felony drunk driving conviction since convictions for those offenses are rare where a defendant tests below the legal limit. [12] In convictions for theft and malicious destruction of property, OV 16, property obtained, damaged, lost, or destroyed,[13] is nearly always scored because felony prosecution is rarely sought where the amount of property obtained or damaged is less than $200. A defendant receives 1 point if the property has a value of $200-$1,000, and 5 points if the damage is $1,000 to $20,000. For most theft and property destruction offenses, the threshold amount for felony conviction is $1,000. Finally, OV 3, physical injury to a victim, [14] is scored 35 points in every conviction for OUIL causing death, and 25 points in every conviction for OUIL causing serious injury, irregardless of the facts of each individual case.

Second, and more importantly, it is the Legislature and not the judiciary that is empowered to determine the policy for sentence scoring. This Court has repeatedly held that judicial opinions do not determine the wisdom of the policy of Legislation and they

---

[11] MCL 777.48.

[12] This was particularly true prior to enactment of Public Act 61 of 2003, effective October 31, 2003, which did away with the inference that a person was not under the influence of intoxicating liquor if that person's blood alcohol content was less than .10%. Under the Act, OV 18 is now scored 10 points if defendant has a blood alcohol concentration of .08-.15%. It seems apparent that OV 18 will continue to be scored at least 10 points in nearly every felony case involving a violation of MCL 257.625, although time will tell whether elimination of the inference will spark a trend toward prosecution of operators with blood alcohol concentrations below the legal limit.

[13] MCL 777.46.

[14] MCL 777.33.

do not constitute a harbor of refuge from ill-advised, unjust, or impolitic legislation. *CF Smith Co v Fitzgerald*, 270 Mich 659, 671 (1935). Policy determinations are reserved to the Legislature. *People v Kirby*, 440 Mich 485 (1992). Thus, where statutory language is plain and unambiguous, the courts must apply its terms as written, *Storey v Meijer, Inc*, 431 Mich 368, 376 (1988), and judicial construction beyond those terms is precluded. *Lorencz v Ford Motor Co*, 439 Mich 370, 376 (1992).

Third, it is clear that scoring would not be authorized for failing to affirmatively offer evidence of guilt because one cannot be compelled to answer questions posed by a police officer. *People v Vasques*, 465 Mich 83, 92 note 3 (2001) (citing *Davis v Mississippi*, 394 US 721, 727 n. 6 (1969)). The Constitutional right to remain silent is quite different than affirmative acts of a defendant to avoid detection or arrest.

In addition, defendant's interpretation of OV 19, if accepted, would render much of the language of the statute nugatory or surplusage, contrary to traditional rules of statutory construction. Although the statute, as enacted at the time of defendant's arrest, made no reference to emergency services workers, the Legislature saw fit to amend the statute in 2001 to include conduct that "interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." The introductory description now indicates: "Offense variable 19 is threat to the security of penal institution or court or interference with the administration of justice or the rendering of emergency services." It is difficult to conceive of an interference with emergency services that would pre-date judicial proceedings. Although this was not part of the statute at the time of the instant offense, it shows that the Legislature had no intention of limiting application of the phrase "interference with the administration of

justice" to what occurs in court. Such a limitation would render the language of the statute referring to emergency service workers surplusage, and would act to negate the Legislature's specific use of the word "court" in other parts of the statute.

Finally, a reasonable interpretation of the statute is that the Legislature intended to punish more severely those who impede a police investigation. Actions of a defendant which impede a police investigation, such as lying about ones identity in the instant case, impact upon police resources, and may indirectly affect the judicial process as where defendant is bonded out under a different name, and another innocent person arrested due to defendant's deceit.

(5) OV 19 is properly scored in the present case where defendant affirmatively lied to the police about his identity.

Plaintiff contends that the phrase "interfered with or attempted to interfere with the administration of justice" is a broad phrase that includes those acts which fall within the category "obstruction of justice." *Thomas, supra* at 457; *Vallance, supra* at 419. Application of OV 19 is not limited to situations where formal judicial proceedings have been instituted as defendant contends, because this artificial limitation would fail to recognize that in many instances, one may obstruct justice or interfere with the administration of justice prior to charges being brought.

Although plaintiff disagrees with some of the reasoning employed in *Deline*, it is possible to reconcile plaintiff's position with that decision. Plaintiff contends that defendant has read far too much into the decision in *Deline*. Although the *Deline* Court indicated that in order find that defendant's actions "interfered with the administration of

justice" the sentencing court must find that defendant's actions were "aimed at undermining or prohibiting the judicial process by which a . . . criminal charges is resolved." *Id.* at 597. What the Court in *Deline* did not specifically hold is that acts aimed at undermining the judicial process must occur after the initiation of formal judicial proceedings. In an unpublished decision following the *Deline* decision, the Court of Appeals held, consistent with *Deline*, that OV 19 was properly scored when defendant gave a false name to the police officer. *People v Holman*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2003 (Docket No. 236868) (Appellee—Appendix, pp 1-7). In *Holman*, the Court distinguished the facts in *Deline* because "defendant affirmatively lied to the police." *Id.* at 5 (Appellee—Appendix, p 5) The facts of *Holman* are indistinguishable from the instant case. The *Holman* Court distinguished between those acts which are merely meant to evade charges altogether, and those in which a defendant affirmatively acts to interfere with the administration of justice. *Id. Holman* also makes it clear that the Court disagrees with defendant's argument that "a person cannot interfere with the 'administration of justice' until after an actual court arraignment.'" The Court states as follows:

> To the extent defendant argues that a person cannot interfere with the "administration of justice" until after an actual court arraignment, we disagree. This contention appears to be rooted in the theory that interference with the "administration of justice" refers only to conduct directly aimed at interfering with the courts. We consider it obvious that, despite their markedly different roles, both the courts and the police function as part of the overall criminal justice system. It is clear to this Court that the investigation of crimes is central to the administration of justice. We are not persuaded by defendant's claim that *People v Deline* requires a different result. In *Deline*, we determined that the defendant was not interfering with the administration of justice when he simply switched positions in a car and refused a blood-alcohol test. The present facts are distinguishable because defendant affirmatively lied to the police. For these reasons,

> we find that the trial court properly scored defendant ten points under OV 19. *Id.*

Similarly, in *People v Ray*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2003 (Docket No. 241559) (Appellee—Appendix, pp 8A-11A), also decided following the decision in *Deline*, the defendant gave different accounts of what happened to police and did not "tell the truth right away." Id. at 3-4 (Appellee—Appendix, pp 10A-11A). Although the Court remanded for determination of whether these actions constituted interference with the administration of justice, the Court did not preclude the possibility that conduct occurring prior to the initiation of judicial proceedings may properly form the basis for scoring OV 19. Finally, in *People v Morgan*, unpublished opinion of the Court of Appeals, issued October 21, 2003 (Docket No. 242731) (Appendix pp 12A-15A) the Court upheld the scoring of OV 19 for pre-charge conduct. In that case, defendant was convicted of assaulting his wife. Following the assault, defendant drove the victim to the hospital and, on the way, told her to tell the story that she had been jumped, beaten and robbed. *Id.* at 1. Despite the Court's earlier holding in *Deline*, the *Morgan* Court found that the trial court's assessment of 10 points for OV 19 was appropriate. The Court states:

> We believe that is case goes beyond merely lying to the police about being guilty, but affirmatively interfering with the administration of justice by inventing a crime where none existed, and falsely reporting that non-existent crime to the police. Accordingly, the sentencing guidelines were correctly scored.

Obviously, the Court of Appeals has not given *Deline* the expansive reading that defendant advocates. The Court seems to have limited application of OV 19 to exclude only those actions of a defendant that are intended to evade charges altogether. It is not

clear whether the Deline Court considered the possibility that the defendant's ineffectual attempt to elude police may have had an impact upon the judicial process when it came time to determine who would be arrested, placed on bond and charged with the offense. It is also not clear whether the Court considered whether defendant's acts were tantamount to an affirmative lie to the police officers investigating the case, which the Court later found in *Holman* justified the scoring of OV 19.

In the present case, defendant gave a false name when asked to identify himself. Although the deception was quickly discovered by the officers when defendant's passenger revealed defendant's true identity, defendant's actions were an "attempt to interfere with the administration of justice" as that phrase has come to be generally understood.

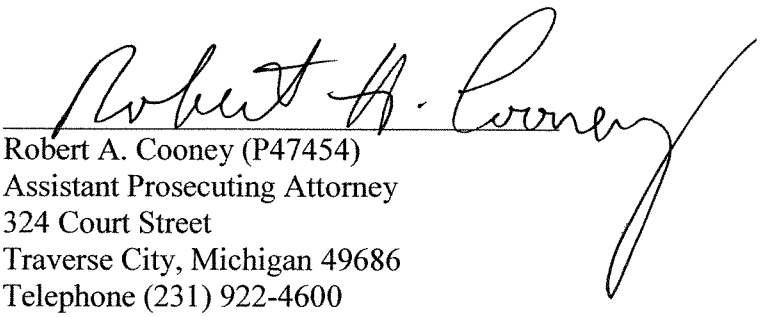
Conclusion and Relief Requested

Offense variable 19 is properly scored where a defendant provides false information of identity to a police officer. The statute seeks to punish a variety of actions which "interfere with or attempt to interfere with the administration of justice." The phrase, "interfere with the administration of justice" is a broad concept that includes those acts which constitute the crimes categorized as "obstruction of justice." Even if one were to accept Court of Appeals finding that "interfere with the administration of justice" is equivalent to "obstruction of justice," it is equally clear that "obstruction of justice" itself includes acts occurring outside the judicial process such as the act of providing false information to or withholding evidence from a police officer. The Court of Appeals in *Deline* unnecessarily limited application of OV 19 to an act which

"involves an effort to undermine or prohibit the judicial process. . . ." This interpretation is contrary to the plain language of the statute, case law interpreting the phrases "administration of justice" and "obstruction of justice," and rules of judicial construction of statutes. For the above reasons, plaintiff respectfully requests this Court to deny defendant's appeal and affirm the trial court's scoring of OV 19.

Grand Traverse County
Prosecuting Attorney's Office

Dated: January 23, 2004



Robert A. Cooney (P47454)
Assistant Prosecuting Attorney
324 Court Street
Traverse City, Michigan 49686
Telephone (231) 922-4600